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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE GENERAL ATOMIC COMPANY, *Petitioner.*

PETITION FOR A WRIT OF MANDAMUS TO THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT, SANTA FE COUNTY, NEW MEXICO

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QUESTIONS PRESENTED

1. Whether this Court's mandates in *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977), and *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978), which held that a New Mexico State court is prohibited by the Supremacy Clause from "interfer[ing] with efforts by GAC to obtain arbitration in federal forums," permit the New Mexico court to vacate arbitration awards entered in California pursuant to arbitration sessions held in that State on the ground that judgments of the Santa Fe court entered before the arbitration was allowed to begin deprived the arbitrators totally of "jurisdiction" to proceed?

2. Whether this violation by the New Mexico State court of this Court's mandates should be reviewed by mandamus?

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General Atomic Company ("GAC")[1] hereby petitions for the issuance of a Writ of Mandamus to the Hon. James W. Musgrove, District Judge of the District Court for the First Judicial District, Santa Fe County, New Mexico, directing that court to vacate its opinion, decision and judgment filed on January 9, 1981 (Pet. App. A, pp. 1a-16a, *infra*).

OPINIONS BELOW

The opinion, decision and judgment of the District Court for the First Judicial District, Santa Fe County, New Mexico, filed on January 9, 1981 (Pet. App. A. pp. 1a-16a, *infra*), are not reported.

JURISDICTION

This Petition for a Writ of Mandamus seeks effectuation of this Court's prior mandates, which have again been violated by an order of the New Mexico State court dated January 9, 1981, invalidating awards obtained

[1] General Atomic Company is a partnership whose constituent partners are Gulf Oil Corporation and Scallop Nuclear, Inc. Scallop is a subsidiary of the Royal Dutch/Shell Group.

after an arbitration conducted in California pursuant to the Federal Arbitration Act.[2] The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a) and Rule 26 of the Rules of this Court. See *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978); *Vendo Co.* v. *Lektro-Vend Corp.,* 434 U.S. 425 (1978).

This Petition is filed contemporaneously with a Petition for a Writ of Certiorari to the Court of Appeal for the State of California (Fourth Appellate District) in *General Atomic Co.* v. *United Nuclear Corp.,* No. 80-2106. That Petition also concerns the validity and enforceability of the arbitration awards entered in San Diego, California, following this Court's rulings in *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977), and *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI of the United States Constitution provides, in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 10 of the Federal Arbitration Act, 9 U.S.C. §10, provides:

> In either of the following cases the United States court in and for the district wherein the award was

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[2] At pp. 12-14, *infra,* we explain the reason why this Petition is being filed now and could not appropriately have been filed earlier.

made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

STATEMENT

This case concerns a dispute between General Atomic Company ("GAC") and United Nuclear Corporation ("UNC") over performance of a 1973 agreement to supply uranium in interstate commerce at contractually fixed prices. The agreement contained a clause whereby the parties agreed to arbitrate "any disputes . . . aris[ing] during the course of" the contract. The present Petition for Mandamus seeks an Extraordinary Writ to vacate a judgment by a New Mexico court which interferes unlawfully for a third time with GAC's arbitration rights under federal law and thus violates this Court's mandates in two prior cases involving judgments by the same State court.

1. This Court's Rulings.

By rulings of October 1977 and May 1978, this Court invalidated orders of the Santa Fe District Court which had first enjoined federal litigation and arbitration and had thereafter "stayed" an arbitration which GAC had initiated against UNC in San Diego, California. *General Atomic Co.* v. *Felter,* 434 U.S. 12 (1977) ("*Felter I*"); *General Atomic Co.* v. *Felter,* 436 U.S. 493 (1978) ("*Felter II*"). This Court held in *Felter I* that the Santa Fe court's April 1976 injunction was unconstitutional under the Supremacy Clause, and it held in *Felter II* that it was "inconceivable" that, after this Court's first ruling, the Santa Fe court again impeded GAC's "absolute right to present its claims to federal forums." 436 U.S. at 497. In *Felter II,* this Court re-emphasized that "the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration or for any other reason whatsoever" and quoted the holding of *Felter I* that "[t]he right to pursue federal remedies" may not constitutionally be restricted by a State court. *Id.* at 496, 497. This Court directed that to comply with the mandate of *Felter I* the Santa Fe court's "stay" order should be "vacat[ed] or modif[ied] . . . to the extent that it places any restriction whatsoever upon GAC's exercise of its right to litigate arbitration claims in federal forums." *Id.* at 497-98.

2. The "Partial Award."

As a result of this Court's decision in *Felter II,* the arbitration which had been initiated by GAC following *Felter I* continued in San Diego, California. The Arbitration Panel, consisting of former Illinois Supreme Court

Justice Walter V. Schaefer, former Secretary of Labor W. Willard Wirtz, and Professor Julian H. Levi, received substantial legal briefs and heard three days of oral argument from both parties in San Diego on UNC's claim that the arbitration was barred because two judgments issued by the Santa Fe court while its unconstitutional injunction and stay were in effect were entitled to full faith and credit. On November 14, 1979, a majority of the Panel (Justice Schaefer and Mr. Wirtz) rejected UNC's argument in a 38-page Partial Award filed in San Diego. The Partial Award appears as Appendix K to the Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp,* No. 80-2106 (pp. 25a-54a). Thereafter, the Arbitration Panel scheduled hearings "on the merits" to begin in San Diego on Monday, June 16, 1980.

3. The "Final Award."

On Friday, June 13, the last working day prior to the scheduled hearing on the merits, UNC and its designated arbitrator, Professor Levi, advised the American Arbitration Association that they were withdrawing from the proceeding. After recessing for one week to give UNC an additional opportunity to rejoin the arbitration, Justice Schaefer and Mr. Wirtz presided over two weeks of hearings in San Diego, during which GAC was required to present its evidence-in-chief and to respond to the defenses which UNC had asserted. On September 12, 1980, the two remaining arbitrators entered a 48-page "Final Award" in San Diego sustaining GAC's position. The "Final Award" appears as Appendix L to the Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106, pp. 81a-124a.

4. GAC's Applications For Confirmation In California Federal And State Courts.

On the day that the Panel's Final Award was entered in San Diego, GAC filed an application for confirmation of the Partial and Final Awards in the United States District Court for the Southern District of California in San Diego, pursuant to the language of Section 9 of the Federal Arbitration Act, 9 U.S.C. §9, which authorizes a confirmation proceeding in "the United States court in and for the district within which such award was made." On October 24, 1980, that court dismissed the confirmation proceeding, holding that in the absence of an independent basis for federal jurisdiction Section 9 does not confer subject-matter jurisdiction on federal district courts to confirm awards issued under the authority of the Federal Arbitration Act.[3]

Immediately following the district court's order of dismissal, GAC filed an application for confirmation, again under Section 9, in the State trial court of general jurisdiction in the situs of the arbitration, San Diego, California. The trial court overruled UNC's initial objections, which were based principally on full faith and credit, and was prepared to consider the merits. The State appellate court intervened, however, prior to any ruling on the merits, and ordered that the proceeding be dismissed. That dismissal is the subject of the Petition for a Writ of Certiorari in No. 80-2106.

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[3] An appeal from that dismissal is pending in the Court of Appeals for the Ninth Circuit (*General Atomic Co.* v. *United Nuclear Corp.*, No. 80-5830), and oral argument was heard on June 2, 1981.

5. UNC's First And Second Petitions For Supplemental Relief.

UNC had, in the meantime, returned to New Mexico and sought invalidation of both the Partial and Final Awards in the Santa Fe District Court, whose prior judgments had been the subjects of *Felter I* and *Felter II*. UNC filed its First and Second "Petitions for Supplemental Relief" seeking to have the Partial and Final Awards vacated and declared void. It asserted that the arbitrators were prohibited from proceeding because of the doctrine of full faith and credit. It claimed that judgments of the Santa Fe court had foreclosed the issues presented in the arbitration even though those judgments had been issued in late 1977 and early 1978, while the illegal stay was in effect.

6. The Santa Fe Court's Decision.

The Santa Fe court requested the parties to file briefs stating their positions. GAC's brief objected to the State court's jurisdiction on the grounds, *inter alia*, that it conflicted with this Court's two rulings prohibiting State-court interference with GAC's federally guaranteed remedies and that it violated the Federal Arbitration Act's specific designation of the court which may confirm or vacate an arbitration award. (General Atomic Company's Brief in Opposition to Petitions for Supplemental Relief, pp. 34-52.)

On January 9, 1981, Judge James W. Musgrove[4] issued an opinion, decision and judgment rejecting these

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[4] Judge Musgrove had replaced Judge Edwin L. Felter, who had issued the orders involved in the earlier rulings of this Court. Judge Felter had been appointed to the Supreme Court of New Mexico, but was defeated in the elections held in November 1980.

objections (Appendix A, pp. 1a-16a, *infra*). In these rulings, the Santa Fe court held that "[t]he arbitrators had no jurisdiction to issue an award in the purported arbitration" (p. 13a, *infra*). The court based this conclusion on its ruling that its own prior judgment of December 27, 1977, which had denied a stay of the Santa Fe proceedings pending arbitration, was "entitled to full faith and credit by all courts and forums" (p. 13a, *infra*). That judgment, together with an April 4, 1978, judgment declaring the 1973 Supply Agreement void, both of which had been filed before the arbitration began and before this Court's opinion in *Felter II*, were said to have deprived the arbitrators of all authority except the "powers . . . to dismiss the proceedings" (p. 8a, *infra*).

The court brushed aside the contrary conclusions of Arbitrators Schaefer and Wirtz. Referring to their Partial Award, Judge Musgrove said (p. 7a, *infra*):

> By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "corom [sic] non judice."

On the basis of these conclusions, Judge Musgrove granted the relief UNC sought — an order vacating "the purported award" of the arbitrators (pp. 15a-16a, *infra*).

REASONS FOR GRANTING A WRIT OF MANDAMUS

1. A New Mexico judgment which reaches out to a California arbitration, rules that the arbitrators had no "jurisdiction" to hear the dispute, invalidates the entire proceeding, and vacates the arbitrators' awards on the ground that pre-arbitration New Mexico judgments had deprived the arbitrators of all authority except "to

dismiss the proceedings" is as effective a denial of the right to assert arbitration claims in federal forums as the pre-arbitration injunction and "stay" which this Court disapproved in *Felter I* and *Felter II*. Just as the "stay" of December 16, 1977, was an unlawful violation of this Court's initial ruling, the latest ruling of the Santa Fe trial court, that decisions of the New Mexico courts issued before *Felter II* disabled the arbitrators from taking any action, is simply another means of interfering with GAC's federal right to pursue arbitration. It made the arbitration conducted pursuant to the Federal Arbitration Act an empty charade. This latest judicial decree thus violates both *Felter I* and *Felter II*.

The judgment of the Santa Fe court rests explicitly on the proposition that judgments of that court issued while GAC was unconstitutionally enjoined from pursuing arbitration under federal law were totally dispositive of GAC's right to arbitrate and that the arbitrators did not have the power to determine the *res judicata* effect of those judgments. The Santa Fe court ruled that as of April 4, 1978 — almost two months before *Felter II* was decided — the arbitrators had no authority or jurisdiction to do anything but dismiss GAC's arbitration demand.[5]

In *Felter I* this Court expressed concern that GAC would be "substantially prejudiced" in its effort "to fairly litigate the various claims arising from this complex action" if a State injunction barring recourse to federal forums were permitted. 434 U.S. at 17. The prejudice to GAC's right "to fairly litigate" is the same — indeed, it is made permanent — if the enjoining court

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[5] The Santa Fe court said that "any agreement to arbitrate no longer existed; it vanished, disappeared" (p. 6a, *infra*). It held that as of April 4, 1978, the date of its default judgment, "there was no contract. There was no agreement to arbitrate" (p. 6a, *infra*).

may invalidate the *result* of the federal proceeding on the basis of a judgment it entered while it was enjoining the arbitration. This Court held in *Felter I* that the "right to pursue federal remedies" may not be "restricted by a state court" through an injunction which prohibits access to the federal remedy. *Id.* at 18-19. It is inconsistent with that conclusion to permit the right to be "restricted by a state court" acting after the fact — *i.e.*, declaring invalid the *result* of the federal remedy entirely on the basis of a judgment entered while the federal remedy was illegally proscribed.

Felter II confirmed the proposition that *Felter I* was not meant to be an empty formality or a meaningless gesture. The Santa Fe court had tried to prevent GAC from arbitrating under federal law in San Diego by "staying" that arbitration on the ground that GAC had "waived" its arbitration rights. This Court held that this was "precisely" what had been prohibited by this Court's previous ruling. 436 U.S. at 496. And it articulated the scope of the conduct forbidden to the Santa Fe court — it may not "interfere with attempts by GAC to assert in federal forums what it views as its entitlement to arbitration." *Id.*

The prohibition against "interference" was described broadly by this Court in *Felter II* (436 U.S. at 497; emphasis added):

> [W]e have held that the Santa Fe court is without power under the United States Constitution to interfere with efforts by GAC to obtain arbitration in federal forums on the ground that GAC is not entitled to arbitration *or for any other reason whatsoever.* GAC, as we previously held, has *an absolute right* to present its claims to federal forums.

That "absolute right" must encompass more than a charade of presenting legal arguments and evidence to powerless arbitrators. It surely includes the right to have an Arbitration Panel decide a preliminary legal issue such as *res judicata* and the right of judicial review and confirmation which *follow* the conclusion of the arbitration pursuant to the statutory scheme for review and confirmation provided by the Federal Arbitration Act. This was made explicit in *Donovan* v. *City of Dallas*, 377 U.S. 408 (1964), on which both *Felter* decisions relied.[6] In *Donovan*, this Court held, in the face of a claim that a federal suit was barred by *res judicata*, that "whether or not a plea of *res judicata* in the second suit would be good is a question for the federal court [*i.e.*, the second forum] to decide." 377 U.S. at 412. By the same token, UNC's claim of *res judicata* and full faith and credit was for the arbitrators to decide, and the state court could not, without violating the mandates of *Felter I* and *Felter II*, deprive the arbitrators of the power to decide that question, either before or after the fact.

This Court made it plain in *Felter II* that it would not countenance any order of the Santa Fe court which "restrict[ed] GAC from pursuing its arbitration claims in other forums." 436 U.S. at 498, n.2. Yet the decision of

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[6] In *Felter II*, this Court quoted the holding of *Felter I* as follows (436 U.S. at 495-96, quoting 434 U.S. at 18-19; footnote omitted):

> "What the New Mexico Supreme Court has described as 'harrassment' is principally GAC's desire to defend itself by impleading UNC in the federal lawsuits and federal arbitration proceedings brought against it by the utilities. This, of course, is something which GAC has every right to attempt to do under Fed. Rule Civ. Proc. 14 and the Federal Arbitration Act . . . . The right to pursue federal remedies and take advantage of federal procedures and defenses in federal actions may no more be restricted by a state court here than in *Donovan* [v. *Dallas*, 377 U.S. 408 (1964)]. Federal courts are fully capable of preventing their misuse for purposes of harrassment."

the Santa Fe court is that its judgments of December 27, 1977, and April 4, 1978, had precisely that effect — albeit in delayed fashion.[7] Rather than forbidding the arbitration, the pre-arbitration, pre-*Felter II* judgments of the Santa Fe court allegedly doomed any arbitration to inevitable invalidity. It is again "inconceivable" that the Santa Fe court could have believed itself "free to again impede GAC's attempt to assert its arbitration claims in federal forums" (436 U.S. at 497) by reaching out in this manner to vacate an arbitration award on the asserted ground that the arbitration proceeding was a total nullity *ab initio*.

2. Upon the issuance of the judgment of the Santa Fe court, GAC filed a notice of appeal and is presently processing its appeal to the New Mexico Supreme Court on the issue presented in this Petition as well as on other issues of federal and State law. In view of the pendency in the California State courts of GAC's motion for confirmation of the arbitration awards (which is involved in the companion Petition for a Writ of Certiorari), GAC did not believe it was appropriate to impose immediately upon this Court the burden of rectifying, once more, the error of the Santa Fe District Court. If the California Supreme Court had reversed the decision of the California Court of Appeal, the arbitration awards would have been reviewed and, we believe, confirmed by the California trial court notwithstanding the decision of the Santa Fe court.[8]

[7] Both of these judgments had been called to the attention of this Court *before* the decision in *Felter II*. If the Santa Fe court were thereafter permitted to hold that arbitration was already foreclosed as of the time *Felter II* was decided, then truly the judgments of this Court would have been treated as "meaningless gestures." See Partial Award, Pet. App. K, Appendix to Petition for Writ of Certiorari, No. 80-2106, p. 47a.

[8] See also this Court's new Rule 27.2(a), which authorizes a writ of mandamus only if "the relief sought is not available in any other court."

The California Supreme Court has now refused to review the decision of the Court of Appeal. Consequently, this Court is being asked to consider the validity of the grounds given by the California Court of Appeal for its ruling. There is, therefore, no sound reason to delay this Court's review, under mandamus standards, of the related decision of the Santa Fe court. To be sure, the New Mexico Supreme Court has not yet rendered a decision on the question whether the trial court's judgment conflicts with this Court's earlier mandates. But as this Court observed in *Felter II*, 436 U.S. at 497:

> A litigant who, like GAC, has obtained judgment in this Court after a lengthy process of litigation, involving several layers of courts, should not be required to go through that entire process again to obtain execution of the judgment of this Court.

If, as we believe, the New Mexico courts were prohibited by *Felter I* and *Felter II* from voiding *ab initio* arbitrations conducted in other jurisdictions under the Federal Arbitration Act on the basis of pre-arbitration Santa Fe judgments, this Court should reaffirm that principle now and direct that the Santa Fe court's latest interference with GAC's pursuit of federal remedies be vacated. Moreover, the California Court of Appeal's mistaken reliance on New Mexico's pre-arbitration decisions as *res judicata* and its erroneous belief that the New Mexico courts are "more suitable forums" for determining the validity of the arbitration awards squarely puts in issue the validity of the decision of the Santa Fe court.[9]

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[9] It is plain from the language of Section 10 of the Federal Arbitration Act and from the decided federal cases that the New Mexico courts have no jurisdiction to vacate an award entered in California. See *City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182, *modified on other grounds*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974); *United States* v. *Ets-Hokin Corp.*, 397 F.2d 935 (9th Cir. 1968).

The two cases are so closely related that it serves the needs of judicial economy for this Court to consider both cases together. This could be achieved if a writ of certiorari were granted in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106, and if this Petition were consolidated, for briefing and argument, with that case.[10]

CONCLUSION

The latest action of the Santa Fe court violates the mandates issued by this Court in *Felter I* and *Felter II*. It is closely related to the decision of the California Court of Appeal for the Fourth Appellate District which is challenged in *General Atomic Co.* v. *United Nuclear*

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[10] Judge Musgrove observed (p. 1a, *infra*):

> There is one thing that can be said of this case with a great deal of certainty. There will be no end until the issues are gathered together, presented to and decided by some court of last resort.

Corp., No. 80-2106. A writ of certiorari should be granted in that case, and it should be consolidated for briefing and argument with the present Petition.

RESPECTFULLY SUBMITTED,

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June 1981

APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, ET AL, *Defendants,*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Third-party Defendants.*

Opinion

(Filed January 9, 1981)

This matter is before the Court on plaintiff's, United Nuclear Corp. (UNC), petition for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Judgment Act, Section 44-6-9 N.M.S.A. 1978, and Section 10 of the Federal Arbitration Act 9 U.S.C. 10 seeking a declaration that the arbitration proceedings were barred by the earlier judgments of this Court and vacating the arbitration awards.

Defendant, General Atomic Co. (GAC), filed its response claiming that this Court lacks jurisdiction, improper venue, improper service and that the petitions fail to state a claim upon which relief can be granted.

There is one thing that can be said of this case with a great deal of certainty. There will be no end until all the issues are gathered together, presented to and decided by some court of last resort. For some time the case has been on parallel courses with the courts on one course and an arbitration panel on the other. This is the first time the courses have converged presenting an opportunity for its final trek to appellate review.

JURISDICTION. This Court has had jurisdiction of the parties and subject matter since December 31, 1975. On April 2,

1976, this Court denied GAC's motion to dismiss this action for lack of personal jurisdiction. On October 15, 1976, the New Mexico Supreme Court affirmed. *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97, 560 P2d 161. That issue was final and became the law of this case. No claim of lack of subject matter jurisdiction was made since the District Court is a court of general jurisdiction and the dispute arose from a contract between the parties. Art. VI, Sec. 13 New Mexico Constitution. The parties agree that state courts and federal courts have concurrent jurisdiction under the Federal Arbitration Act. *Commercial Metals Co.* v. *Balfour, Guthrie & Co.*, 577 F. 2d 264 (5th Cir. 1978). This Court has jurisdiction in this case to apply the Federal Arbitration Act. *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P2d 290, certiorari denied, 44 U.S. 911. That is the law of this case. This Court is bound by that law. The claim of lack of jurisdiction is without merit.

VENUE. This case was originally filed pursuant to the New Mexico Declaratory Judgment Act, Section 44-6-1 et seq. N.M.S.A. 1978. A judgment was entered by this Court on December 27, 1977. Section 8 of the Act mandates the Court to grant further relief based on a declaratory judgment when necessary or proper. Plaintiff has requested this Court for a declaration determining what, if any, effect the action of the arbitration panel has on the prior judgment. Venue is nothing more than the proper location of the forum to hear the case. It is a general rule that actions must be tried where brought unless the venue is changed. *Peisker* v. *Chaney*, 46 N.M. 159, 123 P2d 726. The same applies to supplementing a judgment previously entered. Venue is proper for consideration of further relief pursuant to Section 44-6-9 N.M.S.A. 1978.

Counsel have cited no cases directly stating that a state court considering affirmation or vacation of an arbitration award has to be in the district where the award was made nor have they cited any cases stating that it does not have to be in the district where the award was made.

Section 9 of the Federal Arbitration Act dealing with confirmation of the award states in part —

> "If no court is specified in the agreement of the parties then such application may be made to the United States Court in and for the district within which such award was made."

Section 10 of the Act dealing with vacation of the award states in part —

> "In either of the following cases the United States Courts in and for the district wherein the award was made may make an order vacating the award —"

GAC argues that only a court, Federal or State, in the Southern District of California where the purported arbitration occurred can affirm or vacate the award. An action was filed by GAC in the United States District Court for the Southern District of California to confirm the award. *General Atomic Co.* v. *United Nuclear Corp.*, Case No. 80-1585-E (Sept. 9, 1980). The case was dismissed for lack of subject matter jurisdiction. The case met the same fate in the United States District Court in New Mexico, *United Nuclear Corp.* v. *General Atomic Co.*, Civ. No. 80-845HB (December 11, 1980). GAC filed an application to confirm the award in the Superior Court for San Diego County, California. *General Atomic Co.* v. *United Nuclear Corp.*, Case No. 560547. The Fourth Appellate Division, California Court of Appeals dismissed the action in the Superior Court. *United Nuclear Corp.* v. *Superior Court of the State of California for the County of San Diego*, 4 Civ. No. 24286 (December 16, 1980). Judge Brown dismissed the case for lack of jurisdiction. Judge Brown also held the prior judgments and decisions of the New Mexico court were entitled to full faith and credit. Even if there had been no jurisdiction question that Court would have stayed the California case until this Court entered a judgment under the doctrine of forum non conveniens. As the matter now stands, if GAC's argument were correct, the arbitration award would remain in perpetual limbo. In Sec-

tions 9 and 10 of the Federal Arbitration Act the words "may be made" and "may make an order" are permissive rather than mandatory. Had Congress intended to restrict such action to a particular locale stronger language would have been used. *Allison, Inc.*, v. *Menikin Storage, Inc.*, 452 F. Supp. 573 (1878).

The venue of this Court to consider the arbitration award pursuant to the Federal Arbitration Act is proper.

SERVICE. Service of the petitions requesting supplemental relief and vacation of the arbitration award was made by mailing to opposing counsel in conformity with Rule 5 of the New Mexico Rules for Civil Procedure. The same parties and same counsel are now as they have been in the past. A plethora of pleadings have been enchanged in the same manner. GAC used the petitions as a basis for removal of this case to Federal Court which was then remanded. Counsel was frank to admit there was no real difference whether the petitions were handed to him by the postman or a marshal. To hold otherwise would be to elevate form over substance. Service was proper in this case.

FAILURE TO STATE A CLAIM. GAC argues that the petitions fail to state a claim upon which relief can be granted, to the extent that they seek review of the arbitration awards other than as contemplated by Section 10 of the Federal Arbitration Act.

In considering the motion to dismiss for failure to state a claim for which relief can be granted, all facts well pleaded must be accepted as true and the motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. *Runyan* v. *Jaramillo*, 90 N.M. 629, 567 P2d 478.

The petitions clearly state the grounds of the claim for relief: that the arbitrators exceeded their powers or imperfectly executed them. The petitions also state factual and legal matters in support of those claims. If the matters pleaded in the petitions are accepted as true the plaintiff is entitled to the

relief requested. The claim of failure to state a claim is without merit.

THE ARBITRATION. A petition for a declaratory judgment on a contract between UNC and GAC was filed in this Court on December 31, 1975. On December 27, 1977, this Court entered a decision and judgment denying GAC's motion to stay proceedings and declared that GAC had waived any right it may have had to arbitration; that the issues of New Mexico antitrust violations were not arbitrable; that all other issues were so intertwined with the antitrust issue none were arbitrable. An interlocutory appeal was taken by GAC. On May 7, 1979, in *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P2d 290, the New Mexico Supreme Court affirmed the judgment as to waiver and nonarbitrability and held that the trial court's decision and judgment were not inconsistent with the two United States Supreme Court decisions, *General Atomic Co.* v. *Felter*, 434 U.S. 12 and 436 U.S. 493, arising out of this case. The United States Supreme Court denied certiorari. *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911.

On May 18, 1978, the New Mexico Supreme Court issued a mandate to this Court for such further proceedings as may be proper.

The issues of waiver, nonarbitrability and no inconsistency with the United States Supreme Court decisions were final, the law of the case, res judicata and entitled to full faith and credit by all other courts and forums. In *Ealy* v. *McGahen*, 37 N.M. 246, 21 P2d 84 (1933) the New Mexico Supreme Court in discussing res judicata stated the following:

> "Final judgments are conclusive as to the claim or demand in controversy as to the parties in the suit and those in privity with them, not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Public policy requires that there be an end to litigation and that rights once

established by a final judgment shall not again be litigated in any subsequent proceeding."

The very essence of GAC's motion to stay proceedings in this court was its claim that there was an agreement between the parties to arbitrate the dispute. The Court declared GAC had waived any right to arbitration. The legal effect of that declaration was that any agreement to arbitrate no longer existed; it vanished, disappeared.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. That judgment was affirmed by the New Mexico Supreme Court on August 29, 1980. *United Nuclear Corp.* v. *General Atomic Co.*, _____ N.M. _____. That judgment is final, res judicata, and entitled to full faith and credit until and unless reversed by the United States Supreme Court. At least from April 4, 1978, there was no contract. There was no agreement to arbitrate.

Following this Court's denial of GAC's motion to stay proceedings, GAC initiated arbitration proceedings. GAC did not petition a court to compel arbitration, since there was no doubt UNC had refused to arbitrate, but requested the American Arbitration Association for arbitration. Other than by implication in its motion to stay proceedings in this court, GAC has never petitioned a court to compel arbitration. At GAC's request the American Arbitration Association started arbitration proceedings. UNC under protest appointed an arbitrator and participated in the preliminary proceedings until it became apparent that a majority of the arbitrators would not be bound by the New Mexico judgments and decisions. UNC withdrew from any further participation. The arbitrator appointed by UNC later filed a dissent to the action by the other arbitrators and resigned. The two remaining arbitrators then proceeded to do what the United States Supreme Court had refused to do — review and reverse the New Mexico Supreme Court decision of May 7, 1979. Congress has the power to constitute tribunals inferior to the United States Supreme Court. However, Congress by enacting the Federal

Arbitration Act did not intend nor would it have the power to create a tribunal superior to or even co-equal with the United States Supreme Court. By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "corom non judice." They reached that conclusion even though there is not the slightest hint that the United States Supreme Court intended such a result in the prior opinions. *General Atomic Co.* v. *Felter,* 434 U.S. 12 (Felter I) and 436 U.S. 493 (Felter II).

The United States Supreme Court decisions were quite straightforward: a state court cannot deny a party access to federal forums. At the time of Felter II, the United States Supreme Court had before it the judgment of this Court declaring that GAC had waived its right to arbitration and that the issues were not arbitrable. The only fault the Supreme Court found with the judgment was the one part which interfered with GAC's right of access to a federal forum. At the time GAC petitioned the United States Supreme Court for a Writ of Certiorari, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911, that Court had before it the decision of the New Mexico Supreme Court affirming the judgment declaring waiver and nonarbitrability and the holding there was no inconsistency with the prior decisions of the United States Supreme Court in this case. Certiorari was denied. Common sense and respect for the United States Supreme Court dictates that had the Court believed all action in the New Mexico courts was void after April 2, 1976, they would have said so. To make the interpretation the arbitrators did would place the United States Supreme Court in a position of playing capricious games with the lower courts and litigants. This Court absolutely refuses to believe the United States Supreme Court would indulge in such conduct.

There is a vast difference between a right of access to a forum and a right to the relief sought in that forum. Neither of the parties could be denied access to the Federal District

Court for Southern California or New Mexico or the state court in California. However, having access did not carry with it the right to the relief sought as evidenced by the rather hasty empty handed exit. GAC's right of access to the arbitration forum did not, under the facts of this case, carry any rights to the relief sought.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. From April 4, 1978, there was nothing to arbitrate. The arbitrators were aware of that judgment. On August 29, 1980, the New Mexico Supreme Court affirmed the judgment. The arbitrators were aware of that decision. Undaunted the arbitrators made a purported award on September 10, 1980, in favor of GAC. If not before, at least after April 4, 1978, all action taken by the two arbitrators was corom non judice.

Considering the totality of the action of the arbitrators, the judgments and decisions of the New Mexico Courts and the opinions of the United States Supreme Court an inescapable conclusion appears. The two arbitrators simply did not agree with the results reached by the New Mexico courts. They chose to ignore the courts and reach their own results. Such action at best was a heedless disregard for the fundamental principles of American jurisprudence.

By failing to give full faith and credit to the valid final judgments and decisions of the New Mexico courts which were res judicata as to these parties the arbitrators exceeded their powers. At least after the judgment of this Court, which was affirmed by the New Mexico Supreme Court, declaring there was no contract between the parties to arbitrate, the only powers in the arbitrators was to dismiss the proceedings. The arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made.

Plaintiff UNC is entitled to the relief requested in its petitions.

Some courts involved in this case have commented on the enormous costs for discovery and attorneys' services. There also have been enormous costs to the taxpayers in furnishing facilities, personnel from bailiffs to judges and mountains of paper logistics in the many courts this case has visited. Therefore this fervent prayer: Appellate Court, affirm, reverse or modify, but please do not remand.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, et al, *Defendants,*
INDIANA & MICHIGAN ELECTRIC COMPANY,
Third-party Defendants.

Decision

(Filed January 9, 1981)

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to the New Mexico Declaratory Act and the mandate of the New Mexico Supreme Court and to vacate the arbitration award pursuant to the Federal Arbitration Act.

The Court for its decision makes the following findings of fact and conclusions of law.

Findings Of Fact

1. On December 31, 1975, plaintiff, United Nuclear Corp. (UNC) filed an action for a declaratory judgment involving a contract between UNC and defendant, General Atomic Co. (GAC).

2. On April 2, 1976, this Court entered a judgment denying GAC's motion to dismiss for lack of personal jurisdiction.

3. On October 15, 1976, the New Mexico Supreme Court affirmed the judgment entered April 2, 1976, as to personal jurisdiction. *United Nuclear Corp.* v. *General Atomic Co.*, 90 N.M. 97. No further appeal was taken.

4. On November 29, 1977, GAC filed with the American Arbitration Association a demand for arbitration of the same dispute with UNC.

5. On November 30, 1977, GAC filed a motion to stay proceedings in this Court pending arbitration of the dispute.

6. On December 27, 1977, this Court entered a decision and judgment denying the motion to stay proceedings and declared that GAC had waived any right to arbitration, that the issues of violations of New Mexico antitrust laws were not arbitrable and that all other issues were so entertwined with the antitrust issues, none were arbitrable.

7. On May 7, 1979, the New Mexico Supreme Court affirmed this Court's decision and judgment of December 27, 1977, *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105 and also held there was no inconsistency between the United States Supreme Court decisions, *General Atomic Co.* v. *Felter*, 434 U.S. 12 and 436 U.S. 493.

8. On October 9, 1979, the United States Supreme Court denied certiorari to review the New Mexico Supreme Court opinion referred to in Finding No. 7, *General Atomic Co.* v. *United Nuclear Corp.*, 444 U.S. 911.

9. On April 4, 1978, this Court entered a judgment declaring the contracts between UNC and GAC were null, void, unenforceable and of no effect whatever.

10. On August 29, 1980, the New Mexico Supreme Court affirmed this Court's judgment of April 4, 1978. *United Nuclear Corp.* v. *General Atomic Co.*, _____ N.M. _____.

11. Under protest UNC named an arbitrator and participated in the preliminary proceedings of arbitration until March 29, 1979.

12. On March 29, 1979, the arbitration panel announced it would not give full faith and credit to the New Mexico judgments and decisions. UNC withdrew from further participation. Thereafter the arbitrator appointed by UNC resigned.

13. Shortly after the entry of same this Court's decisions and judgments of December 27, 1977 and April 4, 1978 and the New Mexico Supreme Court opinions of May 7, 1979 and August 29, 1980 were furnished the arbitrators.

14. On September 10, 1980, the two remaining arbitrators issued an arbitration award in favor of GAC. *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation*, No. 73-10-0078-77.

15. The United States District Court for the Southern District of California has dismissed GAC's application and motion to confirm the arbitration award for lack of jurisdiction. *General Atomic Co.* v. *United Nuclear Corp.* Case No. 80-1585E.

16. The United States District Court for the District of New Mexico has declined to assist in the confirmation of the arbitration award or to interfere with this Court's proceedings on the petitions filed herein. *United Nuclear* v. *General Atomic Co.*, Case No. Civ. 80-845-HB.

17. GAC's application to confirm the arbitration award filed in the State Court of California has been dismissed by the California Court of Appeals.

18. GAC has never petitioned any court to compel arbitration.

19. No court has ever ordered arbitration of the dispute between UNC and GAC.

20. The United States Supreme Court opinions in *General Atomic Co.* v. *Felter*, 434 U.S. 12, and 436 U.S. 493 held only that this court could not deny nor interfere with GAC's right of access to the federal forum.

Conclusions Of Law

1. This Court has personal and subject matter jurisdiction in this cause for the purpose of granting supplemental relief under the New Mexico Declaratory Judgment Act and the Federal Arbitration Act.

2. The venue in this Court is proper for granting supplemental relief under the New Mexico Declaratory Judgment Act.

3. The venue in this Court is proper for vacating the arbitration award pursuant to the Federal Arbitration Act.

4. This Court's decision and judgment of December 27, 1977, declaring that GAC had waived its right to arbitration and that the issues were not arbitrable is a valid final judgment. The judgment is res judicata as to these parties and has been since December 27, 1977. The judgment is entitled to full faith and credit by all courts and forums.

5. The opinion of the New Mexico Supreme Court holding that there was no inconsistency between the United States Supreme Court decisions and the judgment of this Court is the law of this case. It is res judicata as to these parties and is entitled to full faith and credit.

6. The judgments of this Court of April 4, 1978, and May 17, 1978, are valid final judgments, declaring the contracts between the parties to be null, void and unenforceable.

7. At least as of April 4, 1978, there was no agreement between the parties to arbitrate their dispute.

8. The arbitrators had no jurisdiction to issue an award in the purported arbitration.

9. In failing to give full faith and credit to the judgments and decisions of this Court and the New Mexico Supreme Court the arbitrators acted in manifest disregard of the law.

10. The arbitrators exceeded their powers.

11. The arbitrators so imperfectly executed their powers that a mutual, final and definite award was not made.

12. Plaintiff is entitled to a supplemental judgment of this Court declaring that the judgment of December 27, 1977 is not affected by the purported award of the arbitrators because the action of the arbitrators was illegal, void and of no effect.

13. Plaintiff is entitled to a judgment of this Court vacating the purported award of the arbitrators as provided by Section 10 of the Federal Arbitration Act.

All requested findings of fact and conclusions of law not adopted herein are hereby refused.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO, COUNTY OF SANTA FE

No. 50827

UNITED NUCLEAR CORPORATION, *Plaintiff,*

v.

GENERAL ATOMIC COMPANY, et al, *Defendants,*

INDIANA & MICHIGAN ELECTRIC COMPANY, *Third-party Defendants.*

Judgment

(Filed January 9, 1981)

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Act and to vacate the arbitration award pursuant to Section 10 of the Federal Arbitration Act. The Court having considered the matters presented, having heard argument of counsel and having entered its decision, which by reference is made a part of this judgment, finds the plaintiff is entitled to the relief requested.

IT IS THEREFORE ORDERED AND DECLARED that the action of the arbitration panel and the purported award issued by the arbitration panel in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77, American Arbitration Association is illegal, void and of no effect on the judgment entered by this Court on December 27, 1977, and plaintiff is still entitled to all the rights, benefits and relief granted by that judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the arbitrators in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation,* No. 73-10-0078-77 having exceeded their powers and having

so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made, the award is hereby vacated and held for naught.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981